IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

Case no: 17869/2012

In the ex parte application of:

ALBERTUS JOHANNES NEL	FirstApplicant
DISCOUNT 4 U CC	Second Applicant

In re:

ALBERTUS JOHANNES NEL	First Applicant
DISCOUNT 4 U CC	Second Applicant

and

PINNACLE POINT HOME OWNER'S ASSOCIATION	First Respondent
FREDERICK CARL VAN DER LINDE	Second Respondent

JUDGMENT:29MAY 2013

Schippers J:

[1] The applicants seek confirmation of an Anton Piller order, and an order directing the respondents to pay the costs of this application. They sought and obtained the order against the respondents, *ex parte* and urgently, on 14 September 2012. In terms of the order, the sheriff was authorised to enter the administration offices of the first respondent at 1 Pinnacle Point, Mossel Bay,

and any vehicles on that premises, for the purpose of searching the "*pinnaclepointestate*" server, the hard drive of any personal computer, notebook or laptop and any external data storage device on the premises, for the documents listed in annexure A to the order ("*the listed items*"); printing out and making copies of the listed items found; and delivering printouts or copies of the listed items to the sheriff.A rule *nisi* was issued, returnable on 17 October 2012, calling upon the respondents to show cause why an order in the following terms should not be made: (a) why the listed items in the possession of the sheriff pursuant to the execution of the Anton Pillerorder, should not be retained by him pending the directions of the Court; and (b) why the costs of the application should not stand over for determination in an action to be instituted by the applicants against the respondents.

[2] The listed items comprise e-mails sent and received by various members of the Board of Directors of the first respondent ("*the Board*"); copies of correspondence between the applicants and respondents; and all documents relating to a decision, allegedly taken by the Board on 1 February 2012, to appoint the first or second applicants as the service provider responsible for managing the clubhouse and golf course at the Pinnacle Point Beach and Golf Resort ("*Pinnacle Point*").

[3] The stated purpose of the Anton Piller order was to preserve evidence pending the finalisation of an action for damages in the sum of R319 200.00, arising from the first respondent'salleged repudiation of a contract concluded on or about 1 February 2012with the applicants. On 27 September 2012 the applicants instituted that action against the respondents.

[4] The rule *nisi* issued by this Court on 16 September 2012 was subsequently extended to 9 May 2013 when the matter came before me.

[5] The respondents oppose the application. They contend that the order should not have been granted in the first place because no case was made out in the founding papers; that the application amounts to an abuse of process; and that the applicants should pay costs on a punitive scale. However, the respondents do not insist that the documents obtained by the sheriffpursuant to execution of the order, should be returned to them.

[6] It is settled that an Anton Piller order is an interlocutory order and as such, may be corrected, altered or set aside by the court which granted it at any time before final judgment, or by a court of concurrent jurisdiction.[1]

[1] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977(3) SA 534(A) at 550 *in fin; Hall and Another v Heynsand Others* 1991 (1) SA 381 (C) at 385D-E.

[7] An applicant for an Anton Piller order must *prima facie* establish: (1) that he has a cause of action against the respondent which he intends to pursue; (2) that the respondent has in its possession specific (and specified) documents or things which constitute vital evidence in support of the applicant's cause of action; and (3) that there is a real and well-founded apprehension that this evidence may be hidden, destroyed or somehow spirited away before discovery or by the time the case comes to trial.[2]

[8] A court has a discretion whether or not to grant an Anton Piller order and upon what terms. In the exercise of this discretion, the court has regard inter alia to: the cogency of the *prima facie* case in relation to the requirements listed in (1), (2), and (3) above; the potential harm to the applicant if the remedy is refused as compared with the potential harm to the respondent if it is granted; and whether the terms of the order is more onerous than is necessary.[3]

[9] Returning to the present case, the basic facts are these. The first respondent is responsible for the management of the golf course and other amenities at Pinnacle Point. In terms of a written contract with the first respondent, the second applicant was appointed as the service provider responsible for managing the club house and golf course at Pinnacle Point, for

[2]*Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Mapanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzberg,and Others* 1995 (4) SA 1 (A) at 15 F-I.
[3]*Shoba* n 2 at 16B-C.

the period 1 September 2011 until 31 January 2012, when that contract expired. I shall refer to that contract as, "*the expired contract*".

[10] The applicants' *prima facie* cause of action, as it appears from the founding affidavit, is this. At its meeting held on 1 February 2012,the Board took a decision to employ the first applicant, MrAlbertusJ Nel ("*Nel*"), on a fixed termcontract for a period of 12 months ending 28 February 2013 ("*the alleged offer*"). A contract came into being on 2 February 2012when Mr Carl Van der Linde ("*Van der Linde*"), an employee of the first respondent, verbally informed Nelof the alleged offer, which he accepted.

[11] On 24 February 2012 Nel received from Van der Linde, the minutes of the Board meeting of 1 February 2012, which the applicants say, confirmed what Van der Linde had told Nel regarding the appointment. Item 8.2 of the minutes reads as follows:

> "*SL queried whether the golf course cannot continue to be run by CVL and BertuNel for the next 12 months at least as opposed to tendering for a new service provider/golf manager. CVL reiterated that the golf course should be self-sustainable. JJ stated that there was underlying work that needed to be done and so he urged caution in continuing to run the course on a "shoestring" budget. FO stated that the R 950 000 in reserve made up for any shortfall. However, the key question is whether BertuNel is manageable for the next period of 12 months. CVL stated that he had only received positive feedback on Bertu's performance from the homeowners, however stated that the club cannot continue to hire him on the current 'month-to-month' basis. HO*

stated that he believed BertuNel to be an asset to the club and a good manager, however he needed to be managed correctly. CVL stated that BertuNel had no control over the finances of the club so there was no need for concern in that regard. JJ stated that he was opposed to BertuNel's appointment as manager from the point of view that he does not want to expose the homeowners to any risk. He stated that there was an investigation being held into the disintegration of the Mossel Bay Golf Course that BertuNel ran and that he could not justify ignoring better candidates that have tendered for the job in favour of BertuNel. The remainder of the board decided to employ BertuNel on a fixed term 12 (twelve) month contract on the basis that throughout this period he would be carefully managed and assessed. In the meantime, the tenders would still need to be submitted to the board for consideration as per the request from the members flowing out of the SGM and AGM held in December 2011."[4]

[12] On 25 July 2012 Nel's services in managing the clubhouse and the golf course, which the respondents say were rendered on a month-to-month basis, were terminated. The first respondent tendered payment to Nelof one month's notice of cancellation for August 2012 and an additional *ex gratia* amount of R40 000.00 in full and final settlement of the contractual relationship between the parties. The next day i.e. 26 July 2012, Nel was given notice that he no longer needed to render any services in August 2012. This notice the applicants accepted as a repudiation of the alleged contract.

[13] The respondents deny that there was any offer at all.They say that the Board did not take any decision to offer Nel a contract for 12months at its meeting on 1 February 2012, as it was obliged to follow a directive of the first respondent's Annual General Meeting (AGM) in December 2011 to call for

[4]Emphasis supplied.

tenders for the management of the clubhouse and golf course, which had to be considered before a formal and long term appointment could be made; and that Nel's contract was on a month-to-month basis terminable by either party on 30 days' notice.

[14] The question which then arises is whether theapplicants have established, *prima facie*, that the Board made the alleged offer, or indeed any offer, with the intention of creating an obligation, which upon acceptance would give rise to an enforceable contract.

[15] A contract is an agreement entered into with the intention of creating an obligation or obligations.[5]The basis of a contract is consensus or a meeting of the minds of the parties.[6]An agreement is reached when there is consensus between the parties that they intend to create between them an obligation with a specific content. The agreement must encompass: (a) the fact that obligations are to be created; (b) the persons between whom the obligations are to be created; and (c) the content of the obligations, i.e. the performances to be rendered.[7]

[16] An agreement is normally reached by way an offer and acceptance. The offer is a statement of intention in which the offeror sets out what performance

[5]Joubert*et al* (eds) *The Law of South Africa* (2nded 2010)Vol 5 Part 1 p 360 para 370.
[6]LAWSA o*p cit* p 360 para 371; *Joubert v Enslin* 1910 AD 6 at 23-24.
[7]See LAWSA *op cit* p 360 para 371 and the authorities there collected.

and on what terms it is prepared to contract. It must contain the terms necessary to constitute a valid contract.[8] The offer must contemplate acceptance and a resultant obligation.[9]

[17] Applying the law to the facts, it appears to me that there is no *prima facie*proof of the existence of an offer by the first respondent, let alone a contract. The alleged offer does not contain any terms upon which the first respondent was prepared to contract. Mr. Smit, who appeared for the applicants, initially argued that the alleged offer was on the same terms as the expired contract.But that is not stated in the alleged offer, and the argument is not supported by the evidence. Next I was referred to a pro forma contract between the first respondent and the second applicant attached to the founding affidavit,as being the terms agreed upon. This contract, which Nel says he prepared and sent to Van der Linde in February 2012, states inter alia that the contract period is 1 March 2012 to 28 February 2013; and that the first respondent would pay a monthly management fee of R50 000.00 for the services. MrSmit rightly conceded that the pro forma contract was destructive of the argument that the alleged offer was on the same terms as the expired contract – the monthly fee under the latter was R40 000.00.

[8]LAWSA *op cit* p 364 para 376; *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670H, affirmed in *Clements v Simpson* 1971 (3) SA 1 (A) at 7E-F.
[9]*Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A) at 850C-851D.

[18] Moreover, on the applicants' own version, the alleged offer contains no terms upon which the first respondent was willing to contract. That much is clear not only from the alleged offer itself, but also from an e-mail which Nel sent to Van der Linde on the very same day that he purportedly accepted the alleged offer. Nel said,

> *"Vir die kontrak se volledigheidwilek net graagmeerduidelikheidoor die volgendehê:*
>
> - *Datum van kontrak – 1 Februarie 2012 tot 28 Februarie 2013.*
> - *Kontrakprys – jyweet self dat die R40 000 vir my en Graham se dienste'n absolute bargain was - watsoujy as billikbeskousonderom die bank tebreek? Ekmoetdaremgenoegkryomteoorleef en ekbetaal reeds vir Graham R20 000.00 per maandwatnouniejouprobleem is nie, maar nogtanskosdit my kwaai.*
> - *Soosjygesien het salonsookbaie extra geld inbringdeuradvertensies en borgskappevir die klub.*
> - *Prestasie bonus – kwalifiseeronsookvir 'n prestasie bonusof is dit net 'n vasgesteldekontrakprys?*"

[19] Nel seeks to explain away this e-mail in reply by stating that he merely enquired about certain aspects before sending Van der Linde the proposed contract and that the enquiry was merely to find out whether he too would receive additional benefits as other staff members of the first respondent. This explanation however does not bear scrutiny. First, it is quite clear from Nel's e-mail that there was no agreement about the contract price or the tenure of the alleged contract, which according to Nel was 13 months. Second, that there was no agreement, is underscored by Van der Linde'sreply on the same day - "*Gee*

my kansomditgoeddeurte dink en tebespreek met die raad en danterugkomnajou toe".

[20] It is quite clear from the founding papers that Nel's proposals in his e-mail of 2 February 2012 were not placed before or discussed with the Board. On the contrary, as already stated, the Board terminated the month-to-monthcontract on 25 July 2012. But more fundamentally, the founding papers show that there was no agreement on an *essentialia* of the alleged contract – the price at which the services would be rendered. And of course, if the alleged offer contained this term, it would not have been necessary for Nel to send the e-mail enquiring about the contract price in the first place.

[21] In my respectful view, and having regard only to the founding affidavit, the applicants failed to establish a *prima facie* cause of action against the first respondent. On this basis alone, the Anton Pillerorder falls to be set aside.

[22] But there is a further difficulty in the way of the applicants. It is thatthe order also falls to be set aside in the light of the respondents' evidence in rebuttal. The question whether the applicants have discharged the *onus* of proving a *prima facie* case must be determined with reference to that evidence, as there are real disputes of fact which arise on the papers.[10] This Court has held

[10] *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 976G-H;

that the usual evidential criteria should be applied in an opposed application for an Anton Piller order.[11]Consequentlywhere, as here, disputes of fact have arisen on the affidavits, a final order may be granted if the facts averred in the applicants' affidavits which have been admitted by the respondents, together with the facts alleged by the respondents, justify such an order, unless the respondents' allegations or denials are so far-fetched or clearly untenable that they may be rejected merely on the papers.[12]

[23] Applying the *Plascon-Evans*rule, the applicants are not entitled to a final order for the preservation of evidence, pending the finalisation of their action. The respondents' evidence is that the Board did not take any decision to employ Nel on a fixed term contract for 12 months, and thus did not make the alleged offer. In a report to the AGM of the first respondent in December 2011, Ms Shelley Mackay-Davidson ("*Mackay-Davidson*"), the Chairperson of the Board and a practising attorney, stated that Nel was contracted to manage the golf operations until 31 January 2012, after which that service would be put out to tender. This is confirmed in the minutes of the AGM.Mr James R Julyan ("*Julyan*"), a director of the first respondent, in an affidavit states that no decision was taken at the Board's meeting held on 1 February 2012 to appoint either of the applicants on a fixed term contract of 12months. In addition, Ms Juliette Thirsk, also apractising attorney,who took the minutes at the meeting of1

[11]*Sun World International Inc v Unifruco Ltd* 1998 (3) SA 151 (C) at 162H-163B.
[12]*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C.

February 2012, states that they were in draft form and that there were a number of aspects recorded in the draft minutes which were not in accordance with what was decided at the meeting. The alleged offer was one of them. Mackay-Davidsonthen amended the minutes to record what had been decided, and on 22 February 2012 sent a revised draft thereof to all Board members by e-mail. The revised draft, which does not contain the alleged offer, was subsequently accepted by the Board as being true and correct.

[24] Apart from this, there are other facts which show that at the relevant times, Nel was aware the Board did not take a decision to appoint him on a fixed term contract. Nel was a member of the first respondent's Golf Subcommittee. He was present at its meeting held on 23 February 2012. The minutes of that meeting record inter alia that the Subcommittee wished to resolve the matter regarding tenders for the management of the golf course in accordance with the decision of the AGM; that the Board was waiting for recommendations from the Subcommittee; that Nel's contract would end on 29 February 2012; and that Julyan recommended that the decision relating to Nel's position be taken by the Board. In the replying affidavit Nel does not dispute the correctness of the minutes of the Golf Subcommittee's meeting of 23 February 2012. He says in reply that Julyan was against his appointment but that Van der Linde and the rest of the Subcommittee were in favour of it; and that Mr. Tannah Harris, a member of the Subcommittee was asked, in his words, "*to … send this*<u>*recommendation*</u>

to the Board". Then he says, "*Upon conclusion of the Golf Committee* (sic) *on the 23rd of February 2012 the second respondent sent me the Minutes of the Board, indicating my appointment*".[13]

[25] Nel however misses the point. If a recommendation for his appointment by the Golf Subcommittee as alleged was sent to the Board only on 23 February 2012, how could the Board have taken a decision to appoint Nel at its meeting on 2 February 2012? And why did he, or Van der Linde,who were both present at the meeting of 23 February 2012, simply not inform the Golf Subcommittee that the Board had already taken a decision to appoint Nel at its meeting of 1 February 2012? In my opinion, the answer is not far to seek. The Board took no such decision.

[26] For these reasons also, the Anton Piller order should be set aside.

[27] In addition, the applicants have not satisfied the requirement that the apprehension that the documents or evidence may be destroyed or spirited away, must be "*real and well-founded*".[14]The fear of destruction must not be flimsy.[15]MrSmit fairly conceded that the high-water mark of their case in this regard is a bald allegation in the founding affidavit that the applicant believes

[13]Emphasis supplied.
[14]*Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 755B; *Shoba* n 1 at 15I.
[15]*Hall* n 1 at 390D-H.

that, "*the First Respondent and its employees will definitely take steps to destroy these documents and to delete them from their computers*". However, there is no reason or any basis set out for this belief.

[28] Nel's alleged belief is completely unfounded essentially for two reasons. The first is that the evidence – in the founding papers no less - points the other way.The second is that Nel could not seriously have entertained a belief that three practising attorneys, officers of the Court, would conspire to destroy and delete documents from their computers; and deliberately flout the rules relating to discovery. And this after they had completely answered Nel'squeries as to whether the Board had taken the alleged decision on 1 February 2102 to appoint him for 12 months; and provided him with documents in support of the first respondent's position.

[29] On his own showing, as long ago as 31 March 2012 Nel was aware that the contract for the management of the golf course was on a month-to-month basis until the board appointed a new golf director, when Van der Linde told him this. On 11 May 2012 Mackay-Davidson sent an e-mail to Nel in which she advised him that at no stage did the Board agree to extend his appointment until the end of February 2013, as it was obliged to follow the directive of the AGM in December 2011 to call for tenders for the service; and that his contract was on a month-to-month basis terminable by either party on 30 days' notice. The same

day i.e. 11 May 2012, the applicants' attorney replied by e-mail. He informed Mackay-Davidson that Nel had indeed been appointed on a fixed term contract for 12 months until the end of February 2013; that this had been confirmed orally; and that MrHerbieOosthuizen ("*Oosthuizen*"), also a practising attorney, had been appointed to finalisea written agreement of employment. Mackay-Davidson was asked to comment on these facts, after which Nel's attorney would take instructions.

[30] Mackay-Davidson responded by letter dated 28 May 2012 in which she said that the alleged decision appeared in a preliminary draft of the minutes. She attached a copy of the minutes of the meeting of 1 February 2012, as approved by the board at the meeting of 9 May 2012, in which the alleged offer is not recorded. She went on to say that Nel's version of the conversation with Van der Linde in which he had supposedly been informed of the alleged offer, was incorrect; and that Van der Linde had informed Nel that the contract would continue on a month-to-month basis at the end of January 2012,until a permanent golf manager was appointed; and that that Oosthuizen had been instructed by the Board to draft a service level agreement to govern the temporary relationship between Nel and the first respondent.

[31] What all of this shows, is that prior to the launching of this application, Nel's conduct is inconsistent with any belief that the respondents would destroy

or delete the documents from their computers. More specifically, after the first respondent had given him the relevant information at the end of May 2012, he could not have believed that the documents would be destroyed. This would explain why he did nothingbetween May and September 2012, when this application was launched.

[32] The applicant did not make out a case in the founding papers that the respondents would hide, destroy or spirit away documents relating to decisions taken by the Board. It follows, in my respectful view, that the Anton Piller order should not have been granted.

[33] In view of the conclusion to which I have come, it is unnecessary to consider in any detail the question whether the documents obtained pursuant to the Anton Piller order constitute vital evidence in support of the applicants' cause of action. It suffices to say that the applicants did not meet this requirement either. The evidence is not of great importance to their case,[16]inasmuch as there is a paper trail in relation to what was decided regarding the management of the golf course and clubhouse at Pinnacle point, before and after the expired contract came to an end.

[16]*Shoba* note 1 at 15J.

[34] What remains is the question of costs. In *Universal City Studios*,[17] Corbett JA said,

> "*Procedurally the typical* Anton Piller*order is very unusual in that it is normally sought* ex parte *without notice to the other party and* in camera. *Moreover, aspects of the order immediately affect in an adverse manner the rights to the other party without him having been heard in opposition to the order. In addition, there is abundant evidence that in the past* Anton Piller *orders have been grossly abused by those in whose favour they had been granted at the expense of those against whom they have been granted."*[18]

[35] An application for an interdict *ex parte* and in camera, should be granted in very clear cases where justice cannot be served otherwise than by depriving the respondent of his right to be heard. In the nature of things such cases are exceptional.[19]

[36] This, plainly, is not an exceptional case, and constitutes an abuse of the Anton Piller procedure. The application was nowhere near urgent – the applicants waited some six months before approaching the Court. They were not justified in doing so *ex parte*. Their enquiries to the respondents regarding the alleged offer and its purported repudiation were answered; and documents were furnished to them in support of the respondents' position.There was no

[17]Note fn 13.
[18]*Universal City Studios* note fn 16 at 752B-C.
[19]*Knox D'arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 379H-I.

basis at all to believe that the respondents would destroy documents or delete them from their computers, for the reasons already advanced. There is no reason why the applicants could not have made use of ordinary discovery procedures to obtain access to the documents required to substantiate their alleged cause of action.[20]

[37] In these circumstances, I am satisfied that an order that the applicants should bear the respondents' costs on the attorney and client scale is justified.

[38] The order I make is as follows:

1. The Anton Piller order and all the orders granted pursuant theretoin the order dated 14 September 2012, are set aside.

2. The rule*nisi* in paragraph 1 of the order dated 14 September 2012 is discharged.

3. The Sheriff, Mossel Bay, is directed to return to the first respondent by no later than Friday 31 May 2013, the documents obtained at its premises pursuant to the execution of the order dated 14 September 2012 and listed in the Sheriff's inventory dated 17 September 2012.

[20] *Rath v Rees* 2007 (1) SA 99 (C) para 37.

4. The applicants are ordered to pay the costs of this application jointly and severally, on theattorney and client scale.

SCHIPPERS J